What Schrems, Delvigne and Celaj tell us about the state of fundamental rights in the EU

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Daniel Sarmiento Fr 16 Okt 2015

The overall message looks puzzling.

First, privacy is a super-fundamental right that reigns supreme above all other rights after the Court's decision in *Schrems*. Second, national electoral rules governing the right to vote in elections to the European Parliament come under the scope of application of the Charter, but Member States can restrict such a right as long they do so in a proportionate way, says the Court in *Delvigne*. And third, illegal immigrants who have already been ordered to abandon the territory of the EU can be subject to criminal prosecution if they ever return, according to the Court in *Celaj*.

In sum, Privacy is a super-fundamental right. The right to vote is quite super, but not as much. The rights to liberty and free movement are not super at all, at least when they concern third country nationals. Is this the kind of case-law one would expect from a fundamental rights court? Does this make any sense at all?

Maybe it does.

In the past few months, we are witnessing the slow but relentless development of what seems to be the Court's overall approach towards fundamental rights in Europe. It began to flourish in *Akerberg Fransson* and *Melloni*, it was hinted at in *Opinion 2/13*, and now we can see it in action, case by base, in the Court's most recent decisions.

This is, of course, a very personal opinion, but I will try to argue that it may be a feasible explanation of what the Court is trying to do.

First, the Court has given a broad interpretation to article 51 of the Charter, thus allowing the Charter to apply in a vast number of cases of Member State action (*Akerberg Fransson*). Therefore, the Court wants Member State to realize that whenever they come close to EU Law, the Charter's shadow looms large over national courts and administrations. Then the Court interpreted article 53 of the Charter (*Melloni*) in such a way that it allows national courts to choose the appropriate level of fundamental rights protection as long as they act in an area of policy in which they have discretion under EU Law ("not completely determined"), or as long as the Charter is not more protective. If there is no margin, only the Charter applies.

And now we are witnessing the system unfold. Indeed, Member States have to apply the Charter in a large number of cases, but the Court is proving that the degree of protection it is conferring to the Charter is rather low, allowing Member States (and above all national courts) to breathe and enjoy a certain degree of action when choosing the kind of fundamental rights protection they want to provide to individuals within their territory. When Member States apply the Charter and their courts ask for guidance, the Court is thus providing a minimum standard of protection. The Court is probably not unconcerned about the degree of protection that individuals deserve in each case; it is rather that the Court might want national courts (and national fundamental rights protection) to assume their part of the job.

In contrast, the Court is proving to be an active guarantor of fundamental rights when it comes to the scrutiny of EU action. When the Court faces general or individual EU acts, it is generally applying a high standard of fundamental rights protection, certainly a higher one than the one it seems to be using for Member States. Thus the judgments in *Markus Schecke*, *Test Achats*, *Digital Rigths Ireland* or, more recently, *Schrems*. These cases, like many others, concern the validity of EU acts in light of the Charter, and there the Court has proved to be enthusiastic to develop a robust and intensive degree of fundamental rights scrutiny.

In sum, we might be seeing the birth of a dual approach towards fundamental rights in the EU, one in which Member States are asked to respect the Charter, but in the confidence that they can keep a considerable margin of discretion in setting the exact degree of protection, while the Union must be aware that it is subject to strict fundamental rights control. The price to pay for an extensive scope of application of the Charter, the price to pay for *Akerberg Fransson*, is the recognition of a large margin of action for Member States.

And thus Opinion 2/13. If the Court proves that it can be a strong defender of fundamental rights when applied to EU acts, then what is the use of accession of the EU to the ECHR? Furthermore, if the Court becomes subject to the ECHR and must interpret the Charter in light of the Convention in preliminary references that concern Member State action, wouldn't that deprive the Court of the margin of action that it wants to preserve and employ in order to define its relation with national courts? Wouldn't Strasbourg unwillingly but lethally interfere in the delicate balance of power that the Court is trying to achieve in its relationship with national courts, and, above all, with national constitutional courts? By proving what a strict level of protection EU acts are subject to under the Court's jurisdiction, the pressure for accession decreases. And national courts, when applying EU Law, will be subject to a harmless Charter, but also to the final decision of Strasbourg by means of exhaustion of domestic remedies. Accession would thus lose its purpose.

Of course I might be completely wrong, but, if I am not, this narrative can be an explanation to the (apparently) contradictory decisions of the Court in the area of fundamental rights. They might not be contradictory at all, but rather the result of a comprehensive vision destined to balance a certain degree of uniformity with large portions of Member State discretion.

If I am right, I think this approach has advantages, but also serious problems. If the Charter is to be used as a minimum standard of protection when scrutinizing Member State action, it will be difficult to ascertain what the precise scope of each right will be. The Charter does not provide a menu of standards for each right, it simply proclaims the rights. Handling two case-laws for each right could prove to be tricky, confusing and eventually it could send the wrong message to the right-holders.

But above all, this approach puts at risk the uniformity and coherence in the interpretation of EU Law. Member States will enjoy larger margins of action in setting the level of protection of fundamental rights, but the equal-level playing field in the territory of the Union will certainly suffer from this design. It is good to allow constitutional courts some degree of breathing space, but it is quite a different story to empower Member States to use fundamental rights as tools that might endanger the autonomy of EU law itself.

And thus we end up where we began, referring again to *Melloni* and *Akerberg Fransson*. The Court was very cautious when deciding both cases and highlighted that the new framework would work just fine, as long as it does not compromise "the primacy, unity and effectiveness" of EU Law. So far, not many cases have proved to compromise these features, or at least the Court has not used this clause so far. I have supported elsewhere that this is an exceptional clause for exceptional cases only. To date, this seems to be the Court's approach too. But by insisting on a robust level of protection for the Union, but a weak one for Member States when they apply EU Law, the day might come in which the primacy, unity and effectiveness might have to be used to save the day. And when that day arrives, national courts will not be happy. Once they have been given the power, taking it away from them could prove difficult, maybe impossible. And then, the dream of a harmonious balance of power among the different guarantors of fundamental rights in Europe might quickly turn into a nightmare. Like in Goya's etching, the dream of reason can produce monsters.

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SUGGESTED CITATION Sarmiento, Daniel: *What Schrems, Delvigne and Celaj tell us about the state of fundamental rights in the EU, VerfBlog,* 2015/10/16, http://verfassungsblog.de/what-schrems-delvigne-and-celaj-tell-us-about-the-state-of-fundamental-rights-in-the-eu/.